

## YOUR RIGHTS REGARDING ACCESS TO MENTAL HEALTH RECORDS

An individual has a right to confidentiality with respect to his or her own mental health records. This right of confidentiality provides that, in most cases, only the individual, the individual's personal representative, and the individual's treatment providers may know the content of the record. In addition, an individual has the right, in most cases, to inspect, copy and amend these records.

A recently implemented set of federal standards, known as the "Privacy Rule"<sup>1</sup> establish, for the first time, national rules for the protection and dissemination of certain health information. Because the Privacy Rule implements the requirement of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA"),<sup>2</sup> the standards are often called HIPAA standards. This pamphlet briefly describes these federal standards.

*The pamphlet also presents Massachusetts law and regulation specific to certain types of providers, but, as these state standards have not been revised since the passage of HIPAA, certain conflicts between the federal rule and the state provisions exist. Where such conflicts occur, the federal standards control.*

### I. ACCESS TO RECORDS

#### Health Care Providers covered by HIPAA's Privacy Rule

The Privacy Rule applies to health plans, health care clearinghouses, and to any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA.<sup>3</sup>

The Privacy Rule protects all "individually identifiable health information" held or transmitted by a covered entity or its business associate, in any form or media, whether electronic, paper, or oral.<sup>4</sup>

Under the Privacy Rule, a covered entity may not disclose an individual's records except as provided by the rule or with the written authorization of the individual or the individual's personal representative. In addition, under the rule, an individual or the individual's personal representative has a right to access their records in most cases, including both inspection and copying.<sup>5</sup>

However, in certain cases, a covered entity can decline to provide such access to the record:

- A licensed health care professional has determined, in the exercise of professional judgment, that the access requested is **reasonably likely to endanger the life or physical safety of the individual or another person**;
- The record makes reference to another person (who is not a health care provider) and a licensed health care professional has determined, in the exercise of professional judgment, that the access requested is **reasonably likely to cause substantial harm to such person**; or
- The request is made by the individual's personal representative and a licensed health care professional has determined, in the exercise of professional judgment, that providing access to the representative is **reasonably likely to cause substantial harm to the individual or another person**.<sup>6</sup>

**Inpatient facilities operated by the Department of Mental Health (DMH), contracted for by DMH, or licensed by DMH and Intensive Residential Treatment Programs (IRTPs)**

At mental health inpatient facilities operated by DMH, contracted for by DMH, or licensed by DMH and at IRTPs for adolescents, access to records is addressed by state law<sup>7</sup> and DMH regulations.<sup>8</sup> In certain cases, DMH policy and guidelines also apply. These standards have not been updated since the implementation of the HIPAA Privacy Rule. To the extent that the HIPAA Privacy Rule conflicts with state law and DMH regulation, the Privacy Rule controls.

An individual or guardian has a right to **inspect** the individual's mental health record, unless the DMH Commissioner or designee has determined that inspection will result in "serious harm" to the individual. An individual has a right to a **copy** of the record when it is in the individual's "best interest."<sup>9</sup> The DMH regulations list certain circumstances in which the best interest standard is automatically met. They include the following:

- When the record will enable the individual, or someone acting on the individual's behalf, to pursue a claim, suit or other legal remedy, to enforce a right, or to defend him or herself against such action;
- To ensure that the individual's civil rights are protected; or
- To enable the individual or someone acting on the individual's behalf to obtain benefits or third-party payment for services rendered.<sup>10</sup>

The expectation of DMH is that: "In most instances, individuals should be permitted to review their records and/or obtain a copy."<sup>11</sup>

**For DMH operated inpatient facilities, private inpatient units located within a DMH operated facility, and any private inpatient facility which has contracted with DMH to follow a recent DMH policy regarding patient rights**, DMH provides further direction regarding the "best interest" analysis. For these facilities, DMH defines disclosure as being in the individual's "best interest" unless:

- There would likely be *serious harm* to the individual, defined as physical or psychological harm which is tangible or concrete, and not hypothetical or insignificant,<sup>12</sup> as a result of disclosure, as determined by a clinician who has reviewed the record and is knowledgeable of the individual;
- The likelihood of harm as a result of disclosure may not be satisfactorily addressed through a staff person reviewing the records with the individual;
- The denial and reasons for it are reviewed with the individual; and
- The denial and reasons for it are noted in the individual's record.<sup>13</sup>

The facility's chief executive officer or designee must review all decisions to deny disclosure.<sup>14</sup>

## **Community programs operated by DMH, contracted for by DMH, or licensed by DMH**

At community programs operated, by DMH, contracted for by DMH, or licensed by DMH, access to records is addressed in DMH regulation. This regulation provides an individual the absolute right to inspect and copy the record upon request.<sup>15</sup> These standards have not been updated since the implementation of the HIPAA Privacy Rule. To the extent that the HIPAA Privacy Rule conflicts with DMH regulation, the Privacy Rule controls.

## **Residential programs licensed by the Office of Child Care Services (OCCS)**

At residential programs licensed by OCCS, access to records is also addressed in OCCS regulations. Such programs must have written procedures regarding access to the record by the resident (taking into account the resident's capacity to understand), parent(s), persons other than the parent who has custody, and persons not directly related to the service plan.<sup>16</sup> The procedures must identify the person or persons, if any, whose consent is required before information in the resident's record may be released.<sup>17</sup> These standards have not been updated since the implementation of the HIPAA Privacy Rule. To the extent that the HIPAA Privacy Rule conflicts with OCCS regulation, the Privacy Rule controls.

## **Facilities operated or licensed by DPH**

At hospitals or clinics operated or licensed by the Department of Public Health (DPH) (and not operated or licensed by DMH), access to inpatient and outpatient records is addressed by state law.<sup>18</sup> These facilities must allow the individual to inspect and copy their records; there is no "best interest" standard.

State law passed before the implementation of HIPAA's privacy rule includes one exception to this right: when the records have been generated by a psychotherapist. This exception is described in the following section, entitled "Other health care providers." However, the HIPAA Privacy Rule, which likely applies to these providers, does not contain this exception and provides controlling legal authority.

## **Other health care providers**

An individual receiving services from a health care provider, other than those providers who fall into any of the above categories, has a right to access his or her entire record.<sup>19</sup> The individual's "authorized representative" is also entitled to the record.<sup>20</sup>

State law passed before the implementation of HIPAA's privacy rule includes one exception to this general rule: a psychotherapist may prohibit access to that portion of the mental health record generated by the psychotherapist, if the psychotherapist believes that access to those specific records would "adversely affect the patient's well-being." If a psychotherapist limits access, he or she must provide the individual with a summary of the psychotherapy records. However, the psychotherapist must provide the entire record

to the individual's attorney or to another psychotherapist if the individual consents to its release.<sup>21</sup>

This exception is only available to those providers who are **not** covered by the HIPAA Privacy Rule, as the Privacy Rule does not contain this exception and provides controlling legal authority.

## **II. REQUESTING A RECORD AND CHALLENGING THE DENIAL OF A REQUEST FOR RECORDS**

Most providers are covered by the HIPAA Privacy Rule and must comply with the rule's requirements regarding record requests. Pursuant to the rule, requests for mental health records must be made in writing.<sup>22</sup> Prior to making a request for records, contact the provider to request the provider's record request form (which must contain certain elements).<sup>23</sup> Individuals and representatives seeking records should make all requests and subsequent contacts in writing and keep copies of all correspondence.

Under the HIPAA Privacy Rule, requests for psychotherapy records must be made using a separate document than requests for other records.<sup>24</sup> However, under the Privacy Rule, such psychotherapy records must be provided under the same standards as other mental health records.

If an individual or the individual's personal representative believes that a request for a copy of the records has been improperly denied, he or she may seek review of that decision. The HIPAA Privacy Rule explicitly provides a process for the review of a denial: the covered entity must designate a licensed health care professional who did not participate in the original decision to deny access as a reviewing official.<sup>25</sup>

State law and regulations, discussed below and written prior to the implementation of the Privacy Rule, provide more direction on the various processes by which denials are reviewed. If these providers are covered by the Privacy Rule, these state standards must comply with the HIPAA requirements.

### **Inpatient facilities operated, funded, or licensed by DMH and IRTPs**

An individual may request a record from an inpatient facility operated by DMH, contracted for by DMH, or licensed by DMH or an IRTP by writing to the facility director, who shall be the DMH Commissioner's designee to determine whether access to records is appropriate.<sup>26</sup> If the facility director denies the request, the individual may appeal the decision to the DMH Commissioner.<sup>27</sup> The Commissioner may be reached at 25 Staniford Street, Boston, MA 02114, (617) 626-8000.

### **Community programs operated, licensed, or funded by DMH**

An individual may request a record from a community program operated by DMH, contracted for by DMH, or licensed by DMH by writing to the program director. If the program director denies the request, the individual should appeal the decision to the DMH Commissioner. The Commissioner may be reached at 25 Staniford Street, Boston, MA 02114, (617) 626-8000.

### **Residential program licensed by OCCS**

An individual may request a record from OCCS licensed residential program by writing to that person designated in the program's procedures. If the request is denied, the individual may seek a remedy pursuant to the program's procedures or file a complaint with the OCCS Regional Director for the region within which the program is located.

### **Facilities operated or licensed by DPH**

An individual may request a record from a facility operated or licensed by DPH by writing to the head of the facility. If the request is denied, the individual may file a complaint with the DPH Division of Health Care Quality, 10 West Street, 5th Floor, Boston, MA 02111, (617) 727-5860.

### **Other health care providers**

An individual may request a record from a health care provider by writing to that provider directly. If the request is denied, the individual should seek legal advice. The individual may also file a complaint with the division of the Board of Registration that licenses that provider.

## **III. FEES FOR RECEIVING A COPY OF ONE'S RECORD**

Under the HIPAA Privacy Rule, facilities and providers supplying copies of an individual's mental health record are entitled to charge a reasonable, cost-based fee.<sup>28</sup> Inpatient facilities licensed by DPH or DMH may charge no more than the actual cost of copying.<sup>29</sup> By department regulation, the same standard applies to community programs licensed or contracted for by DMH.<sup>30</sup>

Facilities and providers may waive the fee in special circumstances, such as when an individual cannot afford to pay. If the records are needed to support a claim or appeal under any provision of the Social Security Act or any federal or state needs-based benefit program, such as SSI, SSDI, EAEDC, or Medicare, a hospital licensed by the DPH or supported by the Commonwealth to any degree may not charge a fee for copying.<sup>31</sup>

#### IV. AMENDING A RECORD

While an individual may not delete information in his or her mental health record, he or she may add information. Under the HIPAA Privacy Rule, an individual and his or her personal representative have a right, in most instances, to amend the record.<sup>32</sup> However, a covered entity may deny an individual's request for amendment for certain reasons,<sup>33</sup> including a determination that the information already contained in the record is accurate and complete.<sup>34</sup> If a covered entity refuses to accept an amendment, an individual may file a statement of disagreement.<sup>35</sup> When a covered entity has denied a request for amendment, the entity must identify the information in the record that is the subject of dispute. The entity then must link or append the individual's request for an amendment, the denial of the request, the statement of disagreement, if any, and the covered entity's rebuttal, if any, to the record.<sup>36</sup> Future disclosures must include these documents.<sup>37</sup>

Massachusetts law and regulations, enacted prior to the implementation of the HIPAA Privacy Rule, also provides for the amending of records. To the extent that the provisions conflict, the Privacy Rule controls. For example, the Privacy Rule provides more specifics about what rights an individual or the individual's personal representative has if a provider rejects an amendment proposed for inclusion in the record.

Agencies of the executive branch of government, such as DMH, are considered "holders . . . of personal data"<sup>38</sup> and must allow an individual to correct or amend his or her record when the individual so requests.<sup>39</sup> If the holder and the individual disagree as to whether a change should be made, the holder must ensure that the individual claim is noted and included as part of the individual's record and included in any subsequent disclosure or dissemination of the record. Thus, DMH operated inpatient facilities and community programs, and DPH operated facilities, must accept an individual's additions to the record and include them whenever forwarding the record.

Other kinds of "holders . . . of personal data" must also allow an individual to correct or amend his or her mental health record. If a facility has a contract or arrangement with one of the agencies covered by this law, the facility is considered a "holder" of those records which the facility maintains because of the contract or arrangement.<sup>40</sup> This law covers records held at DMH licensed or contract inpatient facilities and community programs, IRTPs, OCCS licensed group care facilities, and DPH licensed facilities.

Further, facilities and programs operated by DMH, contracted for by DMH, or licensed by DMH must allow for information to be added to an individual's inpatient record. Inpatient facilities are required to include in the individual's record, among other information, "any other information deemed necessary and significant to the care and treatment of the patient."<sup>41</sup> Community programs are required to maintain records containing "accurate, complete, timely, pertinent and relevant information. If an individual or legally authorized representative believes that the record contains inaccurate or misleading information, he or she may prepare with assistance, if requested, a statement of disagreement which shall be entered in the record."<sup>42</sup>

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1. 45 CFR Part 160 and Part 164, Subparts A and E. (final publication Aug. 14, 2002).
2. Public Law 104-191 (enacted August 21, 1996).
3. Every health care provider, regardless of size, who electronically transmits health information in connection with certain transactions, is a covered entity. These transactions include claims, benefit eligibility inquiries, referral authorization requests, or other transactions for which HHS has established standards under the HIPAA Transactions Rule. The Privacy Rule covers a health care provider whether it electronically transmits these transactions directly or uses a billing service or other third party to do so on its behalf. Health care providers include all “providers of services” (e.g., institutional providers such as hospitals) and “providers of medical or health services” (e.g., non-institutional providers such as physicians, dentists and other practitioners) as defined by Medicare, and any other person or organization that furnishes, bills, or is paid for health care.
4. 45 CFR 160.103.
5. 45 CFR 164.502(a)(2)(i); 45 CMR 164.524(c)(1).
6. 45 CFR 164.524(a)(3).
7. Mass. Gen. L. ch. 123, § 36.
8. 104 CMR 27.17.
9. Mass. Gen. L. ch. 123, § 36; 104 CMR 27.17(6)(f); DMH, Guidelines for Release of DMH Inpatient Medical Records V. (May 3, 1994) (hereinafter, DMH Guidelines).
10. 104 CMR 27.17(6)(f) 3,4,5.
11. DMH Guidelines, I.A.3.
12. DMH Policy 95-5R, Patient Rights and Responsibilities, III.F. (Sept. 6, 1996) (hereinafter, DMH Policy 95-5R).
13. *Id.* at III.E.8.
14. *Id.*
15. 104 CMR 28.09(1)(a).
16. 102 CMR 3.10(5)(a).
17. 102 CMR 3.10(5)(b).
18. Mass. Gen. L. ch. 111, § 70, fourth sentence; § 70E, fifth paragraph, subparagraph (g).
19. Mass. Gen. L. ch. 112, § 12CC.
20. *Id.*
21. *Id.*
22. 45 CFR 164.508(b)(1).
23. *See* 45 CFR 164.508(c).
24. 45 CFR 164.508(b)(3)(ii).
25. 45 CFR 164.524(a)(4).
26. 104 CMR 27.17(7)(a); DMH Policy 95-5R, III.E.14.
27. 104 CMR 27.17(7)(b).
28. 45 CFR 164.524(c)(4). The fee may only include the cost of copying (including supplies and labor), postage (when the individual has requested that the records be mailed), and preparing a summary or explanation (if agreed to by the individual). *Id.*
29. Mass. Gen. L. ch. 111, § 70E, fifth paragraph, subparagraph (g) ("Every patient or resident of a

facility shall have a right...(g) upon request, to inspect his medical records and to receive a copy thereof in accordance with section seventy, and the fee for said copy shall be determined by the rate of copying expenses.") DMH has promulgated guidelines which set the rate for copying DMH inpatient records at \$0.25 per page. DMH Guidelines, I.A.6. However, since this provision is not a regulation and is contrary to a state statute, DMH should not be able to charge more than the rate of copying expense.

30. 104 CMR 28.09 (3).
31. Mass. Gen. L. ch. 111, § 70.
32. 45 CFR 164.526(a)(1).
33. 45 CFR 164.526(a)(2).
34. 45 CFR 164.526(a)(2)(iv).
35. 45 CFR 164.526(d)(2).
36. 45 CFR 164.526(d)(4).
37. 45 CFR 164.526(d)(5).
38. Mass Gen. L. ch. 66A, § 1.
39. *Id.* at § 2(j)(2).
40. *Id.* at § 1.
41. 104 CMR 27.17(2)(s).
42. 104 CMR 28.09(5).